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Supreme Court, U.S.
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NO. 99-A457

In The
SUPREME COURT OF THE UNITED STATES
Winter Term, 2000

Glen Qualls, et al.
Petitioners,

v.

City of Detroit, et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

I. When a municipality has an automatic license renewal scheme and decides not to renew a license, does a license holder have a due process right to notice of the decision not to renew prior to expiration of the license?

II. Are violations of civil rights committed in violation of valid and outstanding injunctive and protective court orders retroactively justified when the injunction is vacated after appeal ?

PARTIES

Pursuant to Rule 29.1 there is no parent or subsidiary company, save Ho-Lee Kow Fireworks Factory, Fireworks Unlimited, and Pyrotechniques Limited, listed in the plaintiff caption below. The individual defendants are agents of the City of Detroit.

Glenn Qualls, Leticia Qualls, and Elizabeth Qualls, Paul Smigelski and Diane Smigelski, individually and dba Ho-Lee Kow Fireworks Factory, and Fireworks Unlimited,Berta E. Perez, Paul A. Brussee, individually and dba Pyrotechniques, Ltd. dba Ho-Lee Kow Fireworks Factory and Fireworks Unlimited,
Petitioners,

v.

City of Detroit, and
Donald L. Robinson, Rayo Baker,Alberta Whitfield, Frank Jackson, Donald Pailen,Richard Lang,Greg Plummer, William Sneed, Robert P. Michalak, [FNU] Curly, David Vann and [FNU] Watson, William L. Hart, James Bannon, Esther Shapiro, Robert Michalik, Thomas Raymus, Marvin Monroe, Mujad Malik, Thomas Peterson, Joseph Zara, Bernhard Mueller, Fred Brandt, Robert E. Williams, Robert Butucel, Steven Hine, Thomas Bowser, Donald Smith, Richard Hathaway, Michael Habib, Michael McCartha, Tim Thomas, Robert Hanes, Steven Mason, Thomas McFarland, Roger Tomei, Paul Cox, Tom Delor, Shelley Tynan, Kenneth Tye, Daniel Kmiecik, Dennis Van Fleteren, Paul Kersanty, Thomas Koval, David Rees, Frederick Burkheiser, Godfrey Qualls, Gregory Hill,Cheslie Lockett, Richard P. Lang, Joseph Smith, Odell Parker, John Bozich, Philip Lipscomb, Amer A. Aazaad, Gregory J. Love, Danny Kemp, Charles Pritchett,

Raymond L. Kunik,Gerald White,William Dunn, Hilda Montleon, John Savinski, Peter Ringler, David Vann, Jack Generalovich, Ralph Daniels, Arnold Joseph, Dennis Holland, P.O. Upshaw, P.O. McKenon, P.O. Weir, R. Wilson, P.O. McCandan, Willie Sneed, Frank Ward, C. Whitfield, John Doe, and James Roe, Sandra Slayton, Donald Bloom, Seth Doyle, O. Wilson, William Martin, and Sergeant W. Stephenson, in their individual and official capacities,

Respondents.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court by seeking a Writ of Certiorari from the judgment of the Michigan Supreme Court, denying delayed Application for leave to appeal on August 31, 1999, declining to address state, federal and constitutional questions, when the opinion of the court on remand and the actions of the City of Detroit, its ordinance, licensing and enforcement activities, are repugnant to the United States Constitution. Jurisdiction is conferred upon the Court to review the judgment and orders in question by Writ of Certiorari pursuant to 28 U.S.C. § 1257 (a).

Constitutional Provisions Involved

United States Constitution, Amendments One, Four, Five and Fourteen, impacting due process and privileges and immunities applied to 42 U.S.C. § 1983 and Detroit Municipal Code § 19-3-70 reproduced at App. P.

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ARGUMENT

I. PETITIONER QUALLS HAD A VESTED SUBSTANTIVE RIGHT TO RENEW A LICENSE DURING LITIGATION WHICH INVALIDATED THE CITY'S ORDINANCE AND AS MINIMUM DUE PROCESS WAS ENTITLED TO TIMELY NOTICE OF THE CITY LICENSING AGENCY'S DECISION NOT TO RENEW IT.....1

II. A MUNICIPALITY'S PATTERN OF VIOLATING CIVIL RIGHTS INCLUDING FOURTH AMENDMENT RIGHTS, AS WELL AS INHERENT PRIVILEGES AND IMMUNITIES AND DUE PROCESS RIGHTS SECURED BY THE FOURTEENTH AMENDMENT, IS NOT VITIATED WHEN AN ORDINANCE DEEMED UNCONSTITUTIONAL IS SUBSEQUENTLY GIVEN A DIFFERENT APPELLATE READING AND THE TRIAL COURT'S RESTRAINING ORDER IS VACATED ON REMAND.....7

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STATEMENT OF THE CASE

A. ENFORCEMENT ACTIONS AND THE CHALLENGED ORDINANCE

There was a substantial amount of fireworks litigation in Michigan and elsewhere in the late 1970's. The Michigan statute (MCL 750.243a, et seq., MSA 28.440(1) et seq.) was effectively nullified by federal court rulings and thereafter amended in 1978 and again in 1980. In addition, the Detroit fireworks ordinance was amended in 1978 and substantially revised in 1979 under the guise of codification. It is against this backdrop that the present dispute between Petitioner Glen Qualls and the City of Detroit over the drafting, construction and validity of the Detroit Ordinance 314-H, as amended, Municipal Code § 19-3-70, et seq. and MCL 750.243a et. seq. arose.

Qualls is a fireworks expert who studied the local, state and federal regulations. He obtained a federal Class B manufacturing and storage license from the BATF for low explosives to put on public displays for various municipalities and civic organizations. He was a member of the Michigan State Police ("MSP") Fireworks Advisory Board while it was active in the early 1980's.[1] He joined the APA and the Michigan Pyrotechnic Association, serving as its president for a year. He has been accepted by the three circuit judges below in this case as an expert in the area of pyrotechnics and has been qualified as an expert in other fireworks litigation.

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[1] The MSP Fire Marshal Division estimated the sale of consumer fireworks in Michigan at $30-40 million annually in the early 1980's. According to the Summary of Trade and Tariff Information, U.S. International Trade Commission, TSUS Item 755.15, consumption doubled nationally in the 1980s and continues to rise.

When Petitioner Qualls started his business in 1978, no city license was required. He was the first licensee in 1979 and apparently remained the only licensee in Detroit until some time between 1987 and 1988. The City's records show that only one other individual managed to obtain a retail fireworks license from 1979 through 1992. Defendant Esther Shapiro, who has continuously been the Director of the Detroit Consumer Affairs Department ("CAD"), has always supported the total prohibition of fireworks and believes that consumer fireworks have no "socially redeeming value" (App. O) In her capacity in this position she is also responsible for supervising the application, grant and renewal of all business and ocupational license in the City of Detroit.

Petitioner's argument has always been that the ordinance, on its face and as applied, is in effect a total prohibition of the retail fireworks business in Detroit. Qualls ceased to be in business after the ordinance was enforced against him in 1993. On information and belief, there are no licensed retail fireworks dealers in Detroit today.

As set forth in the history of the litigation in *Detroit v. Qualls*, 434 Mich 340 (1990) (*Qualls I*), the City seized a mass of fireworks from Qualls when it arrested one of his employees in 1979. There was a further seizure in 1980. After Qualls sued for return of property in 1981, the City filed a complaint for forfeiture as an alternative to returning the fireworks, based on a claim of illegal storage (*Detroit v. Qualls*, WC No. 81-129784-CZ). In 1982, the Hon. John Hausner ruled that it was the City and not Qualls' employee who had violated the law. He approved Qualls' practice of selling restricted fireworks to persons indicating they were to be transported out of state. (App. L)[2]

Petitioner contended that Defendant City has deliberateiy

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[2] The City had stipulated at a 6/10/82 licensing hearing to be bound by Hausner's ruling, if Qualls prevailed and to issue his 1982 license. (App. M)

misled the courts and manipulated this issue as an ex post facto justification for its attacks on Plaintiff-Appellant in 1985-1986, in spite of having stipulated on 6/10/82 to be bound by Judge Hausner's 6/17/82 Order approving Plaintiff's sales practices.

In 1984, Qualls was issued a ticket claiming that he violated the Detroit 100 lb. gross weight storage limitation, *People v. Qualls*, 36th D.C. No. V87-516. That was the beginning of *Qualls I*. Qualls challenged the validity of this provision as applied to consumer fireworks. In this 1984 criminal prosecution, Qualls also claimed that, in the interim, the DOT and APA had conducted definitive testing in 1983, demonstrating the essential safety of common consumer Division 1.4 (old Class C) fireworks.

An evidentiary hearing was held in the 36th District Court on 12/4/84. Qualls produced Dr. John Conkling, a chemist and the Director of the APA. Widely regarded to be the foremost fireworks expert in the country, he testified about the characteristics of consumer fireworks and the results of the testing which had been done by the APA and DOT in 1983, specifically:

a. consumer fireworks suitable for use by the general public have strictly limited pyrotechnic and explosive content because of the federal regulations;

b. they are 75% packaging and cannot cause a mass explosion or deflagration;

c. they represent no greater danger to the public or to firefighters than an ordinary fire.

d. that there was no rational basis for the Detroit ordinance limiting a retailer to a 100 lbs. gross weight and that the ordinance's magazine requirement increased the danger because of confinement.

The 36th District Court, on December 4, 1984, held the storage provision unconstitutional and ruled that the searches of Plaintiff-Appellant's business after the initial inspection were unconstitutional inasmuch as they were warrantless, for the purpose of gathering evidence of crime and not under exigent circumstances; *Michigan v Tyler*, 399 Mich 364 (1977); 436 US

499 (1978).

After the District Court ruling, the City returned to Judge Hausner in the 1981 case on 12/12/94, and asked him to hold Qualls in contempt on the theory that Qualls had violated the 1982 orders by possessing more than a 100 lbs. On December 12, 1994, the Court told the City that it was an administrative matter. If the City believed that Qualls had violated the terms of the license issued pursuant to the 1982 order, then they should revoke the license.

Defendant Esther Shapiro, the CAD Director, put a "do not renew" order on Qualls' license on 12/16/84, did not send him his automatic renewal papers, refused to give him an application in person and then responded to a written request for the 1985 license with four reasons for its summary denial on 4/22/85 without a hearing or notice of right to appeal. Three of the reasons for the denial have been abandoned as false or irrelevant. The final reason, that Qualls had possessed more than the 100 pound limit in violation of his 1984 license is at the heart of *Qualls I*.

Shapiro claimed to be unaware that those charges had been dismissed, the ordinance struck down and contempt denied by Hausner when she wrote the 4/22/85 denial letter . (App O). She claimed that she would not have refused the license had she known. Petitioner argued below that the refusal to renew Qualls' license in 1984 was under taken in bad faith and was a part of the City's campaign to eliminate its only licensed fireworks retail dealer and rose to the level of a constitutional violation under 42. U.S.C. § 1983.

While the City was in the process of denying Qualls his 1985 license, it appealed the 36th District Court decision invalidating the storage provision, suppressing the evidence from the warrantless seizure and dismissing two "failure to allow inspection" tickets. The Recorder's Court, without considering the merits of the case, overruled the District Court on the theory that Judge's Hausner's 1982 injunctive rulings had been binding declaratory rulings and that collateral estoppel applied. However,

he upheld the District Court on the illegality of the warrantless searches and seizures.

Qualls appealed to the Michigan Court of Appeals, which initially upheld the Recorder's Court in *People v. Qualls*, 157 Mich App 552, 403 N.W.2nd 594 (1987) on the collateral estoppel issue. Qualls appealed to the Michigan Supreme Court, which reversed and remanded to the Court of Appeals in *People v. Qualls*, 428 Mich 318 (1987) for consideration of the factual record made in the 36th District Court and the proceedings in the instant case (*Qualls v. Detroit*, Wayne County No. 85-515546-CZ), which was the beginning of the case decided by the Court of Appeals in an unpublished decision on 3/6/91, *Qualls v Detroit*, C.A. Nos. 95518, 115434, 118836, 118837 and 118908 (*Qualls II*.) (App.K.).

To get his 1985 license, Qualls first attempted to go to federal court for injunctive relief, but the federal court abstained *sua sponte*. Qualls then attempted to reopen *Detroit v. Qualls*, Wayne County No. 81-129784-CZ in order to obtain injunctive relief from Judge Hausner on the refusal to issue the license. Hausner refused to reopen the case, but urged the City to process the application, to which counsel for the City agreed.

By now it was June 1985. Qualls filed this action below to compel the issuance of a license or, in the alternative, to allow him to operate without a permit as allowed by MCL 750.243a(3). The City refused to timely process Qualls' application for permit, even after promising that it would do so. On June 28, 1985, Qualls opened without a license, relying on the state statute. On June 3, 1985, Judge Hausner issued an injunction protecting him.

In a series of actions which have become the heart of the damage case below, the City authorities intentionally violated Judge Hausner's Order without attempting an interlocutory appeal. On July 3, 1985, Defendant Fire Marshal Robinson, Chief of Police Hart, City Law Department Chief Pailen, a representative of the Mayor's Office and officers from the DFD, DPD and CAD surrounded his business, detained his vehicles, falsely declared an immediate hazard to life, falsely obtained a search warrant,

wrongfully searched two delivery vehicles and two contiguous buildings, seized all of his fireworks and told him to shut down. They gave him a ticket for having in excess of the 400 lbs. gross weight that Judge Hausner had allowed in his July 3, 1985 injunction by counting the weightof fireworks on the delivery vehicles as being a part of the premises for "storage purposes." Qualls was ultimately exonerated on all these allegations.

On July 4, 1985, Qualls reopened for business under the injunction. The police and fire marshal personnel then undertook an embargo operation which lasted until July 8, 1985. The embargo consisted of maintaining a large contingent of uniformed officers, blocking parking access with marked cars, warning every customer of possible arrest before they entered the premises and stopping and searching every customer as they left the premises. By the afternoon of the 4th, there were huge lines of delayed customers. Fire marshal personnel had stationed themselves inside the building to personally observe every transaction. Qualls moved the sales to an enclosed room and began delivering the goods in sealed packages. This resulted in the officers confronting customers as they left, forcibly taking and opening their packages, issuing tickets and making arrests. By late afternoon, the commander of the police precinct, Defendant Peterson, in conjunction with the head of the City Law Department, Donald Pailen, ordered the business to be shut down again, this time as a public nuisance on the basis that the enforcement requirements at Plaintiff's business had drained all the resources from the precinct and that, therefore, Qualls could not remain in business.

Qualls went back to Court on July 5, 1985 and obtained a supplemental injunction from the Honorable Helene White in Judge Hausner's absence, which again ordered the City to cease its harassment of Qualls' business and ordered the preservation of police tapes and radio transmissions. This Order was also ignored by the City of Detroit Law Department and Fire Marshal Division. The Communications Department erased the tapes.

The remainder of the July 4, 1985 weekend was a stand-off in

which Qualls and his employees were under constant surveillance.

On 7/6/85, in a pre-arranged and photographed incident, a decoy carrying only specific fireworks unrestricted by MCL 750.243a(3) was stopped and searched by officers. By this time, the officers had removed their identification. Her closed packages were ripped open and a false ticket issued, of which she was acquitted (Plaintiff Berta Perez). There was a further incident in which a police sergeant, in an attempt to confiscate a camera with which one of Qualls' employees was recording evidence, chased her to a locked enclosure and then smashed the window of a locked vehicle in order to obtain the offending film and camera, arresting her. The City settled her independent claim (*Pacheco v Detroit*). Defendants also settled that claim (Defendant Mueller) in this case below. The City lost or destroyed the pictures and camera.

Cross motions for contempt were filed after the above events. Judge Hausner held 21 days of evidentiary hearings between October 11, 1985 and April 29, 1986. He ordered parties to produce every available expert from the City, the MSP, the APA, the DOT, etc., in order for him to make declaratory rulings on the issues related to the validity of the Ordinance and the construction of the state statute. Judge Hausner read a 110 page opinion into the record on June 23, 1986, finding the City in contempt, exonerating Qualls, narrowly construing the state statute and invalidating the City Ordinance as it related to the retail sale of fireworks, including the 100 pound gross weight storage provision. Hausner allowed Qualls 1,000 pounds gross weight (Order 6/24/86 - *Qualls v Detroit*, WC No. 85-515546, App.N), the same amount that the DOT allows to be transported without as much as a warning placard.

While Mr. Qualls was in court receiving this decision (June 23, 1986), officers from the DPD, claiming to be unaware of the injunctions which had been issued in 1985, executed search warrants obtained through the Wayne County Prosecutor, based on the false claim that Qualls was engaged in illegal practices. They again seized all of his stock. These charges were ultimately

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Immediately after the raid, Judge Hausner issued orders to show cause against Detroit and the Prosecutor, ordering the seized fireworks to be brought to Court. The Prosecutor and the City refused at first, taking an emergency interlocutory appeal. The Michigan Court of Appeals initially entered a stay, based on bad faith claims about the dangerousness of these consumer fireworks. Further, Defendants claimed that Qualls' eight year practice of selling fireworks for transportation out of state in accordance with the specific provisions of MCLA 750.243a(3)(g) was illegal, contrary to their 6/10/82 stipulation, Hausner's unappealed 6/17/82 order, and the testimony of state's highest fireworks enforcement official, Lt. Eugene Shmitt, the MSP fire marshal, that the practice was legal.

Qualls filed emergency papers demonstrating the safety of consumer fireworks and the bad faith of the City. The Court of Appeals dissolved its stay order on July 1, 1986, but not before the police, fire marshals and Prosecutor had executed two more raids on June 28, 1986, again confiscating Qualls' stock. Again, all these charges were dismissed and most of his property returned by court order, the remainder being unaccounted for.

After the 1986 fireworks season, further motions for contempt, damages and attorney fees were heard by Judge Hausner. On October 17, 1986, Plaintiff amended his Complaint to seek damages for violation of federal constitutional rights, as well as common law torts and state statutory and constitutional

rights.

Further evidentiary hearings and civil discovery were pursued 1987 and in 1988, resulting in Judge Hausner's comprehensive permanent injunction, declaratory relief and contempt damages order on December 16, 1988. (App. R) This Order awarded approximately $125,000.00 in attorney fees to Qualls for work required by the City's contemptuous actions and slightly over $170,000.00 in contempt damages suffered by Qualls in his business as a result of the Defendants' wrongful actions in 1985 and 1986.

The 12/16/86 order below further specifically contained the following important findings:

1. He ordered an end to mass seizures in which the City would confiscate all of Qualls' retail stock if they claimed that he had engaged in a single illegal sale, possessed a single illegal item or had any excess poundage. The police were required to limit their seizures to the items involved in the allegedly illegal transaction or to give Qualls an opportunity to remove the overage, if weight were involved.

2. He approved a special windowless, heatless, lightless storage facility at the back of Qualls' business, built in conformity with MCL 750.243(d), allowing an additional 1,600 lbs. of consumer fireworks as pure storage rather than shelf stock.

The City did not appeal any of these 1985-1988 rulings except: (1) contempt; (2) contempt damages; (3) the power to license fireworks; (4) the overall validity of the Ordinance as it related to retailers.

The trial on the underlying civil rights/damage claim began on January 30, 1989 and continued until March 8, 1989, when it was mistried by Judge Hausner, based on the misconduct of the City, its counsel and Defendant Fire Marshal Robinson. Judge Hausner ordered one of the City's attorneys removed from the case and that the retrial be held outside the City of Detroit, based on the

Court's belief that the City was trying to intimidate the Court and control the courtroom by determining what exhibits (fireworks) could be allowed in the proceedings. The City responded with a motion to disqualify Judge Hausner for bias.

Interlocutory appeals followed and the Court of Appeals upheld Judge Hausner in its unpublished Opinion of March 6, 1991 (*Qualls II*). (App. K.) On June 27, 1989, the Michigan Court of Appeals entered an interim Order vacating Judge Hausner's ruling on the out-of-state sales pursuant to MCL 750.243a(3)(g), holding that such shipments could only be made by "common carrier." The Supreme Court stayed that order for the 1989 Independence Day season.

B. THE MICHIGAN SUPREME COURT DECISION IN DETROIT v. QUALLS, 434 MICH 340 (1990) REGARDING THE VALIDITY OF THE DETROIT 100 LB. GROSS WEIGHT STORAGE LIMITATION (QUALLS

After the remand of the 1984 "excess storage" ticket from the Michigan Supreme Court in Qualls, *People v Qualls*, 428 Mich 918, 403 NW2d 594 (1987), the Michigan Court of Appeals found in *People v Qualls*, 166 Mich App 587, 421 NW2d 248 (1988), that the unrebutted expert testimony in the 36th District Court supported Plaintiff's claim of the irrationality of the 100 pound gross weight storage limitation. However, the Court of Appeals declined to consider the evidentiary record developed before Judge Hausner below in 1985 and 1986, which further established the safety of consumer fireworks and the irrationality of the City's 100 pound gross weight storage limitation. The Supreme Court granted leave again and on June 7, 1989, issued a very narrow ruling at

Qualls, id, p. 334, fn 4:

"We emphasize that this opinion addresses only whether any regulation by the City concerning the retail storage of fireworks, which are not regulated under state law, necessarily conflicts with the fireworks act and whether there is any rational relation between such a provision and public safety. In doing so, we express no opinion on the validity of Judge Hausner's ruling in 1986 that the ordinance was invalid in its entirety. . . " (emphasis added).

At the end of the majority opinion upholding the rational relationship between 100 pound gross weight storage limitation, the Supreme Court said:

"This legal tug of war has generated a decade of litigation between these parties. It may well be that the Court of Appeals will sustain the ruling of the able trial judge who has lived with this situation for years, but we do not yet know that that is so. To avoid the possibility of setting off another round of fireworks below, we stay the effect of judgment in this case, pending the resolution of the cases now pending in the Court of Appeals." *Qualls, Id*, at p. 369.

Instead, the Court of Appeals remanded the civil case to the trial court, where the Hon. Louis Simmons issued opinions contrary to the findings of Judge Hausner, specifically holding that an alleged violation of the 100-lb weight limit warranted denial of renewal of a license, that Mr. Qualls had no vested property right in renewal of his license, and having failed to renew it his claims against the City for constitutional violations must likewise fail.

Neither the court on remand nor the *Qualls I* majority ever addressed the fact that the 1980 amendment to the Michigan

fireworks statute (MCL 750.243d), conforming to the Opinion of the Attorney General No. 5536, pp. 335-337 [1979-1980], specifically exempted "a retailer who has goods on hand for sale to the public in a supervised display area" from the storage requirements of MCL 750.243d. The fact that retail stock should not be considered storage at all indicates that the City's interpretation of Ordinance 19-3-70 to include all retail stock as storage further demonstrates the irrational and prohibitive effect of the 100 pounds limitation. The *Qualls I* dissent pointed out that the City's interpretation of its ordinance placed the ordinance in conflict with MCL 750.243d regarding storage. Judge Hausner specifically addressed this issue in his December 16, 1988 Order.(App.R) However, the Michigan Courtof Appeals, in its unpublished opinion in *Qualls II*, merely relied on the *Qualls I* opinion upholding the validity of the 100 pound gross weight storage provision, rather than analyzing the 1985-1986 record below on this point.

Qualls I never addressed the fact that the Detroit ordinance requires that even the 100 pounds gross weight must be stored in a Type 2 (high explosive) magazine suitable for Class B and Class A high explosives, i.e.-TNT or dynamite (27 CFR 55.203 and 208). Plaintiff-Appellant Qualls asked the Court of Appeals to revisit these issues and correct the mistakes which have continued in the record regarding the storage question in both the civil and criminal proceedings. After the 1984 ordinance violation was remanded by the Michigan Supreme Court to the 36th District Court for trial in 1990, the City abandoned the prosecution, depriving Qualls of the opportunity to correct the record in the original proceeding.

C. THE MICHIGAN COURT OF APPEALS' UNPUBLISHED OPINION IN QUALLS, ET AL V. CITY OF DETROIT, ET AL AND WAYNE COUNTY PROSECUTOR, COURT OF APPEAL NOS. 93518, 94209, 115434, 118836, 118837 AND 118908 (MARCH 6, 1991). (QUALLS II, APP.K)

In addition to the proceedings in the 1984 ordinance violation case, the Michigan Court of Appeals received a number of emergency and interlocutory appeals from 1986 through 1989 involving the injunctive, contempt and declaratory rulings entered by Judge Hausner in the 1985 civil case, originally filed simply to obtain a license for that season. Six of them were consolidated for decision on March 6, 1991 (*Qualls II, App.K*). That unpublished opinion found that Judge Hausner had made insufficient factual findings to invalidate the entire retail portion of the ordinance and that the rest of Hausner's rulings that had been influenced by his finding of total invalidity. The Court therefore remanded the case for a consideration of a number of issues including:

Whether the City had adequate standards for issuing a fireworks license, suggesting that, if there were not adequate standards, the City must either abandon its licensing scheme or give a license to all applicants. On remand, the City abandoned the licensing scheme contained within the fireworks ordinance itself in favor of the City's overall licensing scheme as the basis for establishing the standards for the issuance of fireworks licensing.

Petitioner Qualls initially conceded that Detroit's general licensing scheme was facially valid and provided adequate standards. However, after the City claimed that the refusal to renew a license did not require the same notice and pre-deprivation right to a fair hearing as it required in the case of the revocation of an existing license, Qualls withdrew that stipulation and challenged the adequacy of the City's general licensing ordinance in that respect. Further, discovery revealed that the setting of licensing fees was based in part on the Consumer Affairs Division's subjective analysis of the "social necessity" of the business. Thus, the "standards" issue and the validity of the licensing regimen are preserved for appeal to The United States Supreme Court, including whether record-keeping requirements of the ordinance

were unduly burdensome or prohibitory,
or even if the individual sections of the Detroit ordinance were valid, the overall effect of the ordinance was prohibitive and unconstitutionally enforced, based on the announced hostility of the Detroit authorities to the sale or use of consumer fireworks.

In *Qualls II*, (App. K) the Court directed the lower court to reconsider the amount of contempt damages on remand by reducing for costs of goods sold, re-examining the 25% per year growth rate and excluding profits from illegal sales. Because the Court on remand decided that Qualls was properly denied his license in 1985, the Court ruled that he suffered no damages for the admittedly contemptuous acts of Defendants in 1985 and 1986 because he was not legally in business, which finding Petitioner argued is clearly erroneous.

At *Qualls II* at p. 12-13, the Michigan Court of Appeals invited the parties to review the matter of summary judgment as to the individual defendants after discovery. The Court on remand ruled that the contemptuous violation of court orders, even resulting in criminal prosecution and confiscation of property, did not rise to the level of a constitutional tort.

Thus, almost all of the individual defendants were dismissed on summary judgment on remand, even though Qualls, his business, employees and customers had been harassed and prosecuted for more than a decade in violation of outstanding court orders and had never been found guilty of any violation. The court on remand also determined that the fact that Qualls' entire retail stock had been seized on at least five occasions, both without warrant and with falsely sworn warrants, was not a civil rights violation . (App. G)

Finally, the Court on remand even held that the illegal seizure accompanying the 1984 tickets (specifically suppressed by the 36th District Court, upheld by Recorder's Court and not appealed) and the dismissal of the two tickets for failure to allow inspection pursuant to People v Tyler, supra, did not make out a

constitutional claim. These rulings, as well as the dismissal of the municipal liability claim, are arguably issues of mixed fact and law unsuited to summary disposition preserved for review.

D. PROCEEDINGS ON REMAND AFTER THIS COURT'S DECISION OF 3/6/91 (QUALLS II).

The procedural oddities on remand began when the "able trial judge [Hon. John H. Hausner] who has lived with this situation for years" (*Qualls I*, p. 369), disqualified himself sua sponte and without prior notice on 3/18/92. At that time, all of the substantive decisions to be made on remand were either still pending or on reconsideration. The case was reassigned to the Honorable Louis F. Simmons.

Judge Simmons made it known that he was displeased to have such a massive, complex and aged case thrust upon him. Petitioner contended that Judge Simmons either would not or did not adequately review and grasp the voluminous prior proceedings. The court on remand adopted the course of least resistance, reversing Judge Hausner's prior rulings and eliminating the heart of Plaintiff's declaratory relief and damage case.

Judge Simmons presided over the case from March 18, 1992 until February 11, 1994. He held a bench trial in July and August, 1992, on the declaratory issues regarding the validity of the ordinance, the construction of MCL 750.243a, the conflict between the ordinance and the statute, and the pre-emption of the ordinance and the statute by the federal regulations. He entered an opinion on April 28, 1993, almost completely reversing Judge Hausner and exonerating the City. (App. E)

Judge Simmons then entered a second opinion on September 28, 1993, essentially gutting Plaintiff's damage claims, granting summary judgment to most of the individual defendants and adopting the City's arguments almost verbatim. (App.G)

Thereafter, on January 28, 1994, Judge Simmons

disqualified himself sua sponte without reason, except to state that he was biased and under severe personal stress. He suggested that the stress was related to disciplinary proceedings in which the Judicial Tenure Commission had requested public censure in another case involving the City of Detroit, then pending review in the Michigan Supreme Court. Cf., *In Re Simmons*, 444 Mich 781 (1994).

The case was then assigned to the Honorable Michael Stacey on 2/11/94, who announced his intention to dispose of it before he retired at the end of 1994. Judge Stacey was requested to vacate Judge Simmons' rulings based on Simmons' admitted, but unexplained, bias. Judge Stacey refused. He issued an opinion in the instant case June 30, 1994, denying reconsideration of any of the prior rulings and effectively ending the case. (App.I)

E. PROCEEDINGS IN QUALLS, ET AL V DETROIT, NO 92-206766 (CONSOLIDATED ON APPEAL).

After remand from *Qualls II*, Plaintiff Qualls moved to amend his complaint to add a First Amendment retaliation claim, based on the City's response to Appellant's successful actions in the state and criminal courts challenging the ordinance. Qualls further sought to amend the 1985 Complaint below to add the wrongful actions undertaken against him since the filing of the First Amended Complaint on October 17, 1986.

On December 20, 1991, Judge Hausner denied Plaintiffs' motion to amend the 1985 case. On March 6, 1992, Plaintiff filed *Qualls v Detroit*, WC No. 92-206766 to include the materials sought to be added by the amended complaint. The case was ultimately assigned to Judge Simmons because he had been assigned the 1985 case. In his sua sponte disqualification announcement of January 28, 1994, Judge Simmons specifically said that he knew that he was biased on the 1992 case, but declined

to elaborate. Regardless, Judge Stacey in essence adopted the Simmons rulings in the 1992 case in his bench opinion of June 30, 1994, on the 1992 case, exonerating the City for their wrongful acts in the 1989 civil rights mistrial and for their continued harassment of Qualls in violation of outstanding court orders through 1991, including multiple unsuccessful prosecutions.

As with the 1985 case, Petitioner Qualls settled the few remaining counts in the 1992 case and preserved his right of appeal on the underlying declaratory, summary judgment and damage issues. Thus, these cases are reasonably and properly consolidated on appeal.

It is impossible to receive shipments of consumer fireworks under the Detroit 100 pound limitation because, pursuant to 49 CFR 173.108, 109 and 111(11), USDOT Class C fireworks are shipped in wooden boxes of up to 150 pounds and cardboard boxes of not less than 40 pounds. Because most consumer fireworks are manufactured in Asia, they are boxed and shipped from there through importers and distributors (like Red Devil). The retailer has no control over the size. Under the Detroit storage ordinance, he cannot even receive a shipment containing one case of each of the different categories of consumer fireworks, much less different brands or sizes. It is impossible to do business.

Section, 19-3-6. License Fee

The evidence indicated that the fee for a retail fireworks license was $50 when the ordinance was first enacted in 1979, raised to $250 in 1982, raised to a non-refundable $1,000 in 1987 and was raised again an automatic 15% in 1992 to $1,150.

Dr. John Conkling testified that the Detroit annual license of $1,000 for a seasonal business was quite high. $100 was the typical fee nationwide. The highest fee of which he was aware were those on the year-round interstate highway operations in Tennessee ($750), while seasonal retailers were only charged $25 per year.

David Opperman, the City's expert witness admitted that he

knew of no other fees in Michigan as high as Detroit's and that the Michigan retail fireworks business is seasonal only, not year-round.

Esther Shapiro, is Director of the Detroit Consumer Affairs Division. (App. O)

(a) She admitted that Plaintiff Qualls was the first applicant for a license after the ordinance was passed in 1979. Thereafter, the City went to a cost-based licensing fee schedule in 1982 and that the fireworks fee was raised to $250. The increase in fees was based on the estimated cost of application processing, renewal and enforcement..

(b) She admitted that there was a chart which showed the 1982 cost base calculations, that she was the only remaining City employee who could testify as to the process and that the 1982 increase to $250 involved only data related to Plaintiff Qualls, who was the only license holder from 1979 to 1982.. Consequently, on its face, it appears that the unsuccessful 1979-1981 prosecutions, seizures and forfeiture actions undertaken against Qualls by the City were the sole basis for the increase of his fees from $50 to $250 in 1982.

(c) Shapiro said that the fee schedule was reviewed again in 1987 and increased, based on the cost of enforcement activity to the City since 1982. She denied without documentation that the cost of the appeal in *Qualls I* and the cost of the contemptuous enforcement actions undertaken in 1985 and 1986 were used in the analysis of the 1987 fee increase.

(d) However, she could not say whether or not anyone else had obtained a license by 1987, but that only Qualls had been licensed between 1982 and 1984 and that Qualls might have been the only licensee between 1982 and 1987, when the fee was raised to $1,000.

(e) She admitted that she consulted with co-defendants Fire Marshal Robinson and Inspector White in determining the 1987 fee increase, but denied that any part of the cost was based on

the enforcement actions taken against Qualls. But she then admitted that part of the increase might have been based on those costs because they came undifferentiated from the fire, police and building departments.

(f) She further admitted that the increased cost of the fireworks licensing fee was in part based on enforcement activities taken against unlicensed establishments.

(g) She admitted that she could not rebut the claim that in 1987 $1,000 was the highest retail fireworks license fee in the country or that it was based on the illegal (contemptuous) enforcement actions against Qualls.

(h) She admitted that the $1,000 fee was the highest licensing fee for any licensed activity in the City. The licensing fee for Tiger Stadium was only $656 and for the Renaissance Center Westin (more than 500 room hotel), was only $690.

(i) She admitted that the 1982 fireworks retailers fee was the only fee in the City which was quadrupled in 1987.

(j) After the above information was elicited on cross-examination by Plaintiff, defense counsel attempted to rehabilitate Shapiro by showing that the 1987 licensing fees for "taxi-dancing halls" was as high as that for fireworks .

(k) On re-cross-examination, she admitted reducing fees in relation to costs for what she considered to be socially necessary businesses.

(l) She admitted that she had testified at deposition that consumer fireworks have no socially redeeming value.

(m) She further testified that since the 1987 fee increase on taxi-dancing halls, there were none left in the City.

(n) Finally, there was back and forth discussion throughout Shapiro's testimony about one other establishment that had held a retail fireworks license some time between 1987 and 1992, but that she could not determine when or how long that license was held.

The parties agree that when Qualls abandoned his attempt

to remain in business after 1992, there were no licensed fireworks retailers in Detroit. On information and belief, there are still none.

§19-3-69 of the challenged ordinance deals with transportation in the City. It is completely invalid and preempted for a number of reasons. Subsection (a) provides that it shall be unlawful to transport "fireworks, firecrackers, sparklers or other pyrotechnics of like character" without obtaining a permit from the fire marshal. On its face, it would apply to a retail customer.

The DOT allows the transportation of 1,000 pounds of consumer fireworks [49 CFR 172.504(c)(1)] for commercial purposes, without the need for a permit or a placard. Subsection (c) of the Ordinance adopts the NFPA standard for interstate commerce, rather than the DOT regulations, making it conflict with state law. Further, MCL 750.243c has specifically adopted the DOT regulations for intrastate transport, as has the Michigan Hazardous Materials Act (MCL 480 et. seq). Next, the Detroit Ordinance 19-3-69 makes no differentiation as to class and could therefore, be read to apply the same requirements to the transportation of consumer fireworks that apply to Class B, Div. 1.3 explosives, contrary to DOT regulations.

Thus, Judge Hausner was correct in his 1986 ruling that the Ordinance was invalid and in conflict with the state and federal law in all of its essential aspects (storage, insurance, license, renewal, transportation, record keeping, classification, location, zoning, use, etc.). Judge Simmons ignored the record made from 1984-1992 to uphold the validity of most of the Ordinance.

In his orders from June 3, 1981 through June 24, 1986, Judge Hausner specifically allowed Plaintiff Qualls to possess all DOT Class C consumer fireworks for sale to the public, whether or not they were restricted for use in Michigan.
(App. L,M,N,R) His 12/16/88 Order was never appealed on an interlocutory basis and was not addressed in the Michigan Court of Appeals unpublished decision of 3/6/91.(App.K.)

PROCEDURAL HISTORY BELOW

In an unpublished opinion on May 26, 1998 the Michigan Court of Appeals affirmed the rulings of the Court on remand. (App. D) On September 4, 1998 the same Court denied rehearing. (App. C.) On August 31, 1999, the Michigan Supreme Court declined to review the questions presented on delayed application for leave to appeal the May 26, 1998 Order of the Michigan Court of Appeals, because it was not persuaded that the questions presented should be reviewed. (App. B.) On December 1, 1999 Justice John Paul Stevens granted Petitioner's Motion to extend time to file Petition for Certiorari. This petition is filed in conformance with that order. (App. A)

Additional published earlier history of the case may be found at *Detroit v. Qualls*, 434 Mich. 340 (1990), *People v. Qualls*, 166 Mich. App. 552, 421 NW2d 248 (1988), and *People v. Qualls*, 428 Mich. 318 (1987.)

I. PETITIONER QUALLS HAD A VESTED SUBSTANTIVE RIGHT TO RENEW A LICENSE DURING LITIGATION WHICH INVALIDATED THE CITY'S ORDINANCE AND AS MINIMUM DUE PROCESS WAS ENTITLED TO TIMELY NOTICE OF THE CITY LICENSING AGENCY'S DECISION NOT TO RENEW IT.

Enforcement of licensing legislation whether aimed at regulation or revenue must satisfy applicable due process requirements and not abridge privileges and immunities protected by the Fourteenth Amendment. *Gray v. Connecticut*, 159 U.S. 74, 40 L.Ed. 80, 15 S. Ct. 985 (1895.) 51 Am Jur 2d §70; *Saenz v. Roe*, 526 U.S.--, 119 S. Ct. 1518 , 143 L.Ed2d 689 (1999). A person's failure to renew a license will not preclude him from maintaining an action in tort for damage related to that activity. Id. §69, *Huffmire v. Brooklyn*, 48 N.Y.S. 132, 57 N.E. 176 (1897.) There is a split in authority as to whether delay attributable to licensing officials will relieve an individual from penalty for carrying on an unlicensed activity. Likewise, wrongful refusal of a licensing officer may or may not permit an individual who has otherwise complied with applicable regulations to engage in any lawful activity. Id. § 71, *Diapulsa Mfg. Co. v Birtcher Corp.* 221 F. Supp. 139 (1965.)

A wrongdoer may not rely on an irrelevant unrelated violation on Plaintiff's part, a distinction between ex contractu and ex delicto actions supported by Restatement of the Law of Torts § 889, 13 ALR 2d § 157. The burden of proving an alleged violation of licensing laws rests on the licensing authority, with the degree of proof governed by the civil or criminal character of the enforcement proceedings. The burden of challenging a licensing scheme to establish invalidity of the underlying ordinance or reasonableness of the fee is on the person who makes the assertion and equitable remedies are available to him including mandamus and injunction. 51 Am. Jur 2d § 70,79, 80. Petitioner Qualls had

prevailed on all charges at all levels until apellate remand. (App.L,M,N,R)

In *People v. Rawley* 231 Mich. 374, 204 NW 137 (1925) and *Vernor v. Secretary of State* 179 Mich. 157, 146 NW 338 (1914), the Michigan Supreme Court established a rule that if a licensing regimen is so clearly excessive that it amounts to a prohibition the act must fall. Historically, such analysis turns on whether the licensing regime is in fact a disguised tax, beyond the reach of a municipality's police power. *Op. Justices*, 112 NH 166, 290 A 2d 869, 872 (April 28, 1972.) Licensing fees may not charge for general regulation of an industry and are generally limited to the sum which will compensate for registration, issuance, recording and inspection. *Nitkin v. Admin. of Health Services*, 91 Misc. 2d 478, 399 NYS2d 162 (1975.)

In *Nitkin* the court examined a licensing regimen which charged radiologists for the enforcement costs of a city's entire radiation control program. Petitioner Qualls was likewise subjected to fee increases based on the costs of all the city's fireworks enforcement activities, including unlicensed sales and fire calls. During the period comprising this litigation the licensing fee charged to Petitioner Qualls, (in fact the only person ever to complete the licensing process and sell fireworks in the City of Detroit, all other attempts failing to comply with the licensing regime without effectively transacting any business,) went from $50 in 1979 when the ordinance was enacted to a non-refundable $1000 in 1987, and is now $1150, a sum charged for only one other activity, which the city Consumer Affairs Division also wished eliminated as without redeeming social value, taxi dance halls.

For comparison Tennessee charges the highest fee for retail fireworks in the country, $750 for an annual license, $25 for a two week seasonal license. The City of Detroit charged Tiger Stadium $656 per year for its annual license, a 500-room hotel $690, and testified that its expert had determined that the

application,registration, clerical and renewal costs of a fireworks license were $238.04. (TR- Esther Shapiro, App O) Not only did the licensing fee scheme operate as a prohibition of a permitted activity under the guise of regulation, but fundamental rights inherent in a licensing regimen were violated by retaliatory enforcement actions of those charged with its operation once petitioner successfully challenged the constitutionality of the City of Detroit's ordinance.

California Courts have employed the following analysis to determine whether licensing impacts a vested fundamental right, thereby triggering a higher level of scrutiny upon review of an administrative termination of the license. *Berlinghieri v. Director of Motor Vehicles*, 33 Cal. 3d 392, 657 P.2d 383,385 (1983.)

"When an administrative decision affects a right which has been legally acquired or is otherwise vested,... and that right is of a fundamental nature from the standpoint of its economic aspect or its effect in human terms... and the importance to the individual in the life situation, then a full and independent judicial review of that decision is indicated because the abrogation of the right is too important to relegate it to exclusive administrative extinction."

Petitioner Qualls has devoted his life to the joyous expression of fireworks and the study of its science and is no longer able to engage in this enterprise. He is now destitute, despondent and disillusioned as a result of this deprivation. Mr. Qualls right to renew his license was extinguished by an arbitrary administrative decision of Consumer Affairs director, Esther Shapiro. By placing the note "Do Not Renew" in his license file and taking it out of the automatic renewal track until it expired, she accomplished by indirection that which she was not permitted to do directly.

Without so much as the customary notice of expiration and renewal, this violation of a vested fundamental interest was thereby

accomplished in the absence of any meaningful due process. Moreover it was accomplished in this manner with full knowledge that a formal revocation would have triggered a review hearing in which the City would undoubtedly have failed to prevail. The City's agents withheld the renewal application to create and exploit a change in status once it expired, creating an opportunity for arbitrary denial of a new license once the vested license expired.

On remand the court upheld this result grounded in a portion of the ordinance which had been invalidated at the time Ms. Shapiro made her decision regarding the alleged violation of the weight provision for stored fireworks, the very charge which had been dismissed as meritless in an earlier criminal action. Over ten years later the court on remand revived this groundless charge as a valid administrative basis for refusing to renew Mr. Quall's license.

Additionally, the court on remand found that Mr. Qualls had failed to make timely application to renew his license during the three months following the licensing division's administrative subterfuge, despite a record that Mr. Quall's was refused an application upon oral request and subsequent written request to the Consumer Affairs Division, and declined injunctive relief in the court with ongoing enforcement jurisdiction because the trial judge felt that he lacked authority to provide such relief, (as did the Federal District Court.) The trial court found it had already afforded Mr. Qualls a remedy in a protective order permitting him to operate his business without a license. (Judge Hausner Order, App. L,M,N,R)(Opinion on remand, Hon. Louis Simmons 9/28/93, App. G)

The Michigan Supreme Court compounded this error when they refused to revisit this issue, after remand. The Michigan Court of Appeals had earlier identified this conduct as a valid claim under 42 U.S.C. 1983. (App.K) On remand, the court specifically held that precedent identifying a valid property right in renewal of an existing license subject to periodic renewal as Petitioner Qualls'

license, need not be subjected to tolling analysis or any of the other mitigating factors presented to the court in *Detroit v. Mashlakjian*, 15 Mich. App. 236, 239-41, 166 NW2d 493 (1968).

Mashlakjian describes a license, whether called a renewal or new application, as a fundamental and vested property right, requiring due process protection, specifically notice and an opportunity to be heard. Accord *Bankers Life and Casualty Co. v. Cravey*, 208 Georgia 682, 69 S.E. 2d 87 (1982) and *Bundo v. City of Walled Lake*, 395 Mich. 679, 238 NW2d 154 (1976), a case squarely on point and contrary to the holding of the Michigan Courts, where even in the face of an admitted violation of a licensing ordinance, notice of intent not to renew communicated by city authorities to the licensing agency was found to impact an existing property right in the renewal, requiring notice to the license holder and an opportunity to be heard, and findings sufficient to withstand an arbitrary and capricious standard of review.

The court on remand reasoned ex post facto that denial was justifiable and that Qualls' application was distinguishable as untimely. Such analysis begs the triggering question for a Section 1983 due process claim: why was no application provided or available to file prior to the expiration of his existing license?

The answer is starkly evident. Unlike any of the other 4,000 licensees in the City of Detroit Mr. Qualls received no written or oral notice that his license would not be renewed, and was deprived of any meaningful opportunity to have his objection heard, precisely because the administrative authority knew of his defense- that any denial to license was baselessly grounded in a statute that had already been deemed invalid under an existing court order in his favor.

Other courts have reasoned more soundly, recognizing that even an explicit statutory provision prohibitting a court from enjoining suspension or revocation of a license must fall as unconstitutional, both to protect the rights and subject matter of the

litigation, and as a matter of preserving the inherent authority of the court and the public trust in the integrity of the judicial process.To find otherwise would nullify the appellate process such that neither party could rely on protective orders of the court. *Smothers v. Lewis*, 672 SW2d 62 (Ky.1984.) The Court on remand is clearly in legal error under this analysis and the Michigan Supreme Court has failed to recognize this error as a violation of fundamental due process rights afforded under the Fifth and Fourteenth Amendments requiring clarification and remedy by the United States Supreme Court.

II. A MUNICIPALITY'S PATTERN OF VIOLATING CIVIL RIGHTS, INCLUDING FOURTH AMENDMENT RIGHTS, AS WELL AS INHERENT PRIVILEGES AND IMMUNITIES AND DUE PROCESS RIGHTS SECURED BY THE FOURTEENTH AMENDMENT, IS NOT VITIATED WHEN AN ORDINANCE DEEMED UNCONSTITUTIONAL IS SUBSEQUENTLY GIVEN A DIFFERENT APPELLATE READING AND THE TRIAL COURT'S RESTRAINING ORDER IS VACATED ON REMAND.

The Michigan Supreme Court affirmed without comment the legal reasoning of the court on remand in setting aside Petitioner Qualls claims for violations of civil rights under 42 U.S.C. § 1983 in Qualls II, a civil suit brought against the city for its actions after its ordinance was invalidated, subsequently consolidated with the ordinance violation on appeal. (Op. Hon. Louis Simmons, Sept. 28, 1993 at App. G) Relying on the qualified immunity reasoning expressed in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 1717, 73 L.Ed. 2d 393 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 639-41, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987), the court on remand deemed most of the city's agents engaged in discretionary functions as outside Section 1983 liability as a matter of law and subjected Petitioner Qualls civil rights claims to summary disposition.

Asserting that a claim of systematic harrassment and malicious prosecution was dependent on a violation of a specific identifiable constitutional right, the court on remand cited 16 A CJS Constitutional Law § 27A, p.115 for the proposition that Mr. Qualls had no vested property right in the trial court's order while it was subject to appeal and control of the court, and therefore dismissed complaints that fire and police officials swore out warrants in the face of a protective restraining order permitting Mr. Qualls to conduct business without a city permit, simply because the court could later rule he had no right to be in business as a

result of a subsequent appellate reading which later revived a portion of the constitutionally invalidated ordinance.

Unfortunately, the cited authority is merely half of the loaf. The CJS section was concerned with subsequent legislative impairment of judgments, immediately distinguishable from a judicial action. Moreover, the same section at p.117 distinguishes public rights from private rights, and in stark contrast upholds the authority of the trial court's orders as determinative of rights immediately adjudicated before it. The language cited by the trial court is only applicable as incidentally conferring no vested right on third parties indirectly affected by the trial court's order. By implication, in contrast to the holding of the Michigan Courts, Petitioner Qualls, had a private and present right to conduct business at the time of the alleged civil rights violations secured by court injunction as well as an inherent " vested " right to rely on that privilege he obtained by lawful process, which vested at that time and continued until a contrary order issued from the new fact finder on remand. In addition, Petitioner Qualls secured immunity from further undue process by the City of Detroit granted specifically to him by the trial court and secured by the Fourteenth Amendment.

These private rights, whether First Amendment, commerce, or property rights would be properly distinguishable from an assertion by a fireworks seller elsewhere making the same claim, because the third person would not be a party to the suit. The trial court simply conferred no public rights by its orders and misapplied this principle to the conduct of the parties' in the suit which explicitly conferred protected personal, commercial, liberty and property interests on Mr. Qualls.

Such a reading is consistent with the Michigan Court rule under which the protective injunction issued:

" An Order granting an injunction or restraining order: (4) is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in

active concert or participation with them who receive actual notice of the order by personal service or otherwise. " MCR. 3.310.

It is precisely by virtue of this active concert and participation, that Petitioner Qualls earlier prevailed on findings of contempt against the same city and its agents for the same acts, raising evident questions of fact and law under the very authority cited by the remand judge whether " a reasonable official would understand that their actions violated a clearly established right." *Guider v.Smith*, 431 Mich. 559, 565, 568 (1988, citing, Harlow, supra. in App. G)

By imperfectly finding as a matter of law in summary disposition that Mr. Qualls had no rights to be violated, the jury questions regarding the additional elements of a section 1983 claim including proximate cause, willfull misconduct, and actions under color of law, custom or usage were obviated in contravention of the Michigan Court rule relied on to grant summary disposition.

MCR 2.116 (C)(10) expressly provides: "(10) Except as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The court on remand raised a mixed question of fact and law regarding section 1983 liability when it expressly found that the license renewal division had a " mere ...custom " of forwarding renewal applications, which was not done in the instant case, and that a city agent, Esther Shapiro, with an expressed animus to Mr. Qualls and his trade, had thwarted this process, which petitioner maintains is the proximate cause of any failure to renew of his license.

To restate this tautology, when wrongful government actions cause a party's right to expire, there is no remedy under the statute providing for redress of government violation of civil rights because the right has expired.

Rights protected under the § 1983 are also protected against impairment by policy or custom under color of state law and may proceed under a theory of respondeat superior. Some jurists view the question as turning on who in fact is the policy maker; others ground relief in the remedies of the earlier variants of the statute. *Jett v. Dallas Independent Public School Dist.* 491 U.S. 701, 109 S. Ct. 2702, 2724; 105 L.Ed. 2d 598 (1989 conc. Scalia,J., diss. Brennan, Marshall,Blackmun, Stevens, JJ.); Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983, Ch.6 (4th Ed., 1998, citing inter alia, Amend. § 101 Civil Rights Act of 1991, Pub. L. No. 102-166, for the proposition that Congress intended that all benefits, privileges, terms and conditions of contractual relationships are protected against impairment or discrimination by local government under a joint reading with § 1981.) Such unbridled official discretion as evidenced here might well lead to a state of affairs in which citizens were left without any enforceable rights. *Suter v. Artist M.* 503 U.S. 347, 112 S. Ct. 1360, 118 L.Ed.2d 1 (1992, diss. Blackmun, Stevens, JJ.)

The court on remand erroneously relied on *United States v. United Mine Worker's*, 330 U.S. 252,295, 67 S. Ct. 677, 91 L.Ed. 884 (1947) and falls short of its intended mark in holding that Petitioner Qualls right to relief for a constutional tort for violation of an injunction failed when the injunction was subsequently vacated by the Michigan Supreme Court after appeal.(Simmons Op. App.G)

In *United Mine Workers* , even though the court lacked explicit statutory authority to issue the injunction, it was later upheld by a reading of legislative intent which was controversial at the time, and contrary to modern judicial construction. In marked contrast, the injunction at the heart of Qualls cases was a valid order, and the actions of the City of Detroit and its agents in the face of that order are properly evaluated at the time they occurred. The determination whether the city officials actions engaged in a pattern of harassment or malicious prosecution designed to impair

Mr. Qualls right to rely on substantive and procedural due process as fundamental to the integrity of the judicial system itself as the authority of the court's own orders, raises a jury question on its own merits, additional to any individual rights issues preserved for Section 1983 analysis.

The *United Mine Workers* opinion is moreover, instructive in distinguishing the public and private interests to be protected. Where the contempt proceeding is remedial only and relates to a private interest only, a remedy sounds in civil contempt, in contrast to those circumstances where the authority of the court and the public welfare require protection, requiring additional relief for criminal contempt.(Op. Judge Hausner at App. L, M, N,R)

United Mine Workers was decided in 1947, prior to any significant development of § 1983 liability analysis. The case turns on application of the War Powers doctrine to congressional legislation protecting union strikers from "government by injunction ," under circumstances where the United States government had become the employer, nationalizing the mines and regulating wages under an emergency act during World War II. Id. at 895.

The Federal court lacked authority to issue a 10-day temporary restraining order in the face of a miner's strike, because the statute granting such relief did not contemplate the United States as an employer. When the injunction expired due to its time limit and the Union went on strike, the United States Supreme Court held that the union officials were still liable for the criminal contempt fines, fees and costs for violating the terms of the order even though it was void ab initio.

The single sentence cited in the remand opinion as an impediment to Petitioner's recovery reads:

" The right to remedial relief falls with an injunction which events prove was erroneously issued. "

In the context of the cited opinion it becomes clear that further inquiry is necessary.

" An order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional... violations are punishable as criminal contempt even though later set aside on appeal ... " as in excess of jurisdiction or that the basic action is moot.
Id., at 91 L.Ed 893.

In dissent, Justice Rutledge, envisioned the dangers of a later court employing this reasoning to breach the hull of the Shipp Doctrine, melding judicial discretion with criminal contempt and dissolving constitutional protection. United States v. Shipp, 203 U.S. 563, 27 S. Ct. 165, 51 L.Ed 319 (1906.) A subsequent finding of lack of jurisdiction does not enable disregard of a stay order.

" Some future government could easily utilize seizure as a subterfuge... whenever ... finding that the public interest was in peril... In other cases involving doubt, where statutory or other rights are asserted or the benefit of asserting them would vanish for any practical purpose with obedience to the order. " *United Mine Workers*, at 936, 943, (Rutledge, J. diss.)

In precisely this fashion the court on remand recognized the 4th Amendment implications and still upheld the seizure in 1985-86 of all of Petitioner Quall's stock to ascertain whether it exceeded the ordinance weight limit because now, in 1998 that portion of the statute which was deemed invalid at the time had been upheld on appeal. As described above in issue I, this suspect violation which was dismissed at the trial level was employed to justify non-renewal of Mr. Qualls' business license and years later justify dismissal of those portions of his civil rights claims.

The court on remand gave no weight to the commerce rights of customers or to congregate without search of their purchases, deeming them devoid of standing, dismissing any commerce rights Petitioner had to associate with his customers, and likewise deeming the right of named Plaintiff Berta Perez to be free of seizure and restraint of her person without a warrant as falling with the injunctive relief, and subsumed in the newly discovered constitutional validity of the ordinance after remand in 1998, to find probable cause that she possessed illegal fireworks in 1985, despite a contrary court order at the time of the violation, and an admission that there was no showing that she possessed, or that Mr. Qualls sold her illegal fireworks under any extant variant of law. (Remand Opinion 9/28/93, App G)

A litany of smashed windows, seizure of cameras and destruction of police radio transcripts ordered preserved by the trial court, damage to Mr. Qualls premises and seized stock, not to mention loss of business opportunity during the short fireworks season, is transmuted into lawful conduct by holding that since the earlier court's order was subsequently found to be partly in error, or vacated in part years later, the City's misconduct then is now deemed justifiable by misapplication of injunctive analysis in the *United Mine Workers* case to preclude any recovery for constitutional torts. In June of 1994 and May of 1996 other judges compounded this error on remand by likewise granting summary disposition under similar analysis as to any remaining claims. (App. I, J) Such a reading is far outside the strike zone of protected liberty interests.

CONCLUSION

It would appear that the *United Mine Workers* holding which Justice Rutledge found " full of dangerous implications for the future " has born unconstitutional fruit in the City of Detroit

and requires clarification and remedy from this Court. The Court should grant Certiorari to clarify the nature of the the interests protected by the trial court's injunction, including Petitioner Qualls' right to renew his existing business license during the appellate period, and the subsequent impact of a later appellate reading on the actions of City of Detroit officials undertaken at that earlier time to contravene a valid court order. An order to the Michigan Supreme Court preserving Mr. Qualls' prima facia case for civil rights violations earlier recognized by the Michigan Court of Appeals and remand to the trial court for hearing on the merits is necessary to preserve the fundamental constitutional interests implicit in the orderly administration of justice, and preserved in the First, Fourth and Fifth Amendments of the United States Constitution, applicable to the State of Michigan under the Fourteenth Amendment.

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App. D. Order Michigan Court of Appeals May 26, 1998
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App. E Opinion on Remand Hon. Louis F. Simmons, Jr
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App. F. Order on Remand Denying Motion for Declaratory
Relief and Reconsideration,
Hon Louis F. Simmons, Jr, Wayne County Circuit Ct.
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App. G. Opinion and Order on Remand
Dismissing Section 1983 Claims
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App. H. Order of Dismissal After Remand
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App. I Order After Remand Regarding Summary Disposition
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App. J Order on Motion for Summary Disposition
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App. K Michigan Court of Appeals Opinion (unpub. 3/6/91)
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App. L Order For Return of Seized Fireworks
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App. M. Stipulation for Licensing, Storage and Dismissal of
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App. N. Injunctions, Declaratory Relief, Contempt and
Return of Seized Property
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App. O Selected testimony Esther Shapiro
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Trans. Evidentiary Hearing 8/5/92, pp. 56,69,70-76,81-82

App. P. Detroit Ordinance 19-3-70
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App. Q. Opinion
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App. R. Opinion
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